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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID P. TRISTAN, JR., Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION et al., Defendants and Respondents.	D060285 (Super. Ct. No. 37-2009-00075534-CU-OE-SC)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Affirmed.

I.

INTRODUCTION

David P. Tristan, Jr., a parole agent for the California Department of Corrections and Rehabilitation (the Department), sued the Department and several of his supervisors—Michael Ayala, A.J. Garcia, and Maritza Rodriguez.[1] Tristan's first

1 We refer to the Department and the supervisors collectively as "respondents."

amended complaint contained four causes of action, including claims for discrimination and retaliation under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[2] (first cause of action); harassment under FEHA (second cause of action); whistleblower retaliation (Lab. Code, § 1102.5) (third cause of action); and violation of the California Whistleblower Protection Act (§ 8547 et seq.) (fourth cause of action). Tristan named the Department as a defendant in all of the claims, and named Ayala, Garcia, and Rodriguez as additional defendants in his harassment claim.

Respondents moved for summary judgment on a number of grounds. With respect to Tristan's whistleblower claims, respondents maintained that the Labor Code claim was barred because Tristan failed to file a mandatory notice of claim, and that the Government Code claim was barred because Tristan failed to exhaust his administrative remedies. With respect to both FEHA causes of action, respondents argued that the claims were based largely on conduct that was not actionable in light of the one-year statute of limitations that applies to such claims. Respondents further contended that there was no evidence that Tristan had been discriminated against, retaliated against, or harassed because of his membership in a protected class. The trial court granted respondents' motion for summary judgment in its entirety and entered judgment in their favor.

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2 All subsequent statutory references are to the Government Code, unless otherwise specified.

On appeal, Tristan contends that the trial court erred in granting respondents' motion for summary judgment. For the reasons explained in the body of this opinion, we affirm the judgment.

Prior to considering the merits of Tristan's claims, we address his contention that respondents abused the summary judgment process in the trial court. In the introduction section of his brief, Tristan complains that respondents' motion for summary judgment was "oppressive," as the court in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 (*Nazir*), used that term. (See *id*. at p. 248 ["we confront the poster child for . . . criticism [of summary judgment motions in the employment litigation context], in a case involving what may well be the most oppressive motion ever presented to a superior court"].) In particular, Tristan contends that respondents' separate statement of facts "missed the mark" because it was drafted in a way that did not "permit[] the trial court to hone in on truly disputed facts." (*Id*. at p. 252.) While we agree with Tristan's observation that the summary judgment record in this case is extraordinarily lengthy given the nature of the claims, we are not persuaded that it is *respondents* who are to blame for "a record the likes of which we have never seen."[3] (*Id*. at p. 250.)

Respondents filed a 37-page statement of facts (compare with *Nazir*, *supra*, 178 Cal.App.4th at p. 249 ["defendants' separate statement was 196 pages long"]) that generally conforms to the statutory requirement that such a statement set forth "plainly and concisely all material facts which the moving party contends are undisputed" (Code

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[3] The appellant's appendix in this case comprises more than 10 volumes and is more than 2,300 pages in length.

Civ. Proc, § 437c, subd. (b)). Contrary to Tristan's contention, respondents' statement is drafted in a manner that permitted the trial court to hone in on the merits of respondents' motion. The length of respondents' statement of facts is not unreasonable in light of the numerous factual allegations contained in Tristan's 42-page operative first amended complaint. In opposition, Tristan filed a *225*-page separate statement of facts that wholly violated the "plain[] and concise[]" statutory requirement (Code Civ. Proc., § 437c, subd. (b)). In addition, Tristan drafted his separate statement of facts in such a manner as to impede the trial court's efforts to determine whether the papers revealed a disputed issue of material fact. For example, Tristan's opposition to just one of respondents' facts (separate statement of fact No. 2) is approximately *34 pages* in length, and outlines nearly the entire factual basis of his complaint. The trial court should not have to sift through this morass to determine the existence or nonexistence of a genuine issue of material fact.

While the record resembles that lamented by the *Nazir* court, we emphatically reject Tristan's complaints that it is *respondents* who abused the summary judgment process. (Cf. *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113 (*Lewis*), disapproved on another ground as recognized in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41-42 ["Despite their own deficient statement of the facts, plaintiffs have the chutzpah to complain about . . . defendants' statement of facts"].)

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Tristan's first amended complaint*

In September 2009, Tristan filed the operative first amended complaint. The first amended complaint alleged generally that Tristan had suffered two work-related knee injuries, one in October 2005 and a second in January 2008, and that respondents had engaged in various form of discrimination, retaliation, and harassment in response to Tristan's requests for benefits and workplace accommodations based on his injuries.

With respect to the first injury, Tristan alleged that on October 21, 2005, he assisted another parole agent, Larry Ferguson, in effecting the arrest of a parolee. According to Tristan, the parolee attempted to evade arrest and assaulted Tristan while attempting to flee. Tristan suffered a knee injury during the arrest.

Tristan alleged that Garcia and Ayala committed misconduct related to reports concerning the incident, and that this misconduct hampered his ability to receive enhanced disability benefits. Tristan further alleged that in November 2005, he reported Garcia and Ayala's misconduct to the Department's regional administrator and the Department's deputy director, and subsequently suffered retaliation for having reported the misconduct. Specifically, Tristan alleged that the Department instituted an internal affairs investigation related to Tristan's disability benefits claim, that the Department did not initially permit Tristan to perform "light duty" after his injury, and that Ayala and Garcia assigned Tristan an excessive workload when he returned to work in January 2007, among other retaliatory actions. Tristan also alleged that Rodriguez "apparently

approved" an involuntary transfer in January 2007 that was "halted" only after Tristan complained to the regional director, and that Rodriguez failed to meaningfully address Tristan's complaints concerning Ayala and Garcia after Tristan returned to work in 2007.

Tristan alleged that he suffered a second knee injury on January 28, 2008, while assisting in the arrest of another parolee. As discussed in greater detail in part III.B.3.b.ii., *post*, Tristan alleged that the Department engaged in additional unlawful conduct related to this injury, including interfering with Tristan's ability to seek proper medical treatment, failing to negotiate a proper light duty assignment, and interfering with Tristan's right to receive workers' compensation benefits.

Tristan incorporated these factual allegations into four causes of action, including claims for discrimination and retaliation under FEHA (§ 12900 et seq.) (first cause of action); harassment under FEHA (second cause of action); whistleblower retaliation (Lab. Code, § 1102.5) (third cause of action); and violation of the Whistleblower Protection Act (§ 8547 et seq.) (fourth cause of action).

B. *Respondents' motion for summary judgment*

In February 2011, respondents filed a motion for summary judgment. With respect to Tristan's FEHA claims, respondents noted that a plaintiff asserting a cause of action under FEHA is required to first file an administrative complaint with the Department of Fair Employment and Housing (DFEH) within one year of the alleged unlawful employment practice. Respondents argued that since it was undisputed that Tristan had not filed an administrative complaint with DFEH until January 29, 2009,

portions of his FEHA claims were not actionable insofar as they were based on alleged unlawful practices that occurred before January 29, 2008.

Respondents also contended that the Department was entitled to summary adjudication of Tristan's FEHA discrimination and retaliation claim (first cause of action) because Tristan failed to adequately allege that he was stating a claim for discrimination in his DFEH administrative complaint. In addition, the Department maintained that the individual defendants were entitled to judgment as a matter of law on Tristan's FEHA harassment claim (second cause of action) because Tristan failed to exhaust his administrative remedies as to these defendants by failing to name them in his DFEH administrative complaint. With respect to both FEHA causes of action, respondents further contended that there was no evidence that Tristan had been discriminated against, retaliated against, or harassed because of his membership in a protected class, among other contentions.

Respondents argued that the Department was entitled to summary adjudication of Tristan's Labor Code whistleblower claim (third cause of action) because Tristan failed to file a mandatory notice of claim with the California Victim Compensation and Government Claims Board (Government Claims Board). Respondents argued that the Department was entitled to judgment as a matter of law on Tristan's Whistleblower Protection Act (§ 8547 et. seq.) claim (fourth cause of action) because Tristan failed to exhaust his administrative remedies, as statutorily required. Respondents supported this contention by noting that it was undisputed that Tristan had voluntarily dismissed two administrative complaints that he had filed with the State Personnel Board (Board) prior

to having received any findings from the Board. (See pt. III.B.2., *post*.) Respondents also argued that Tristan's complaints to his supervisors about unfavorable personnel actions taken against him did not constitute protected disclosures under the Whistleblower Protection Act.

Respondents supported their motion with excerpts from Tristan's deposition, Tristan's answers to interrogatories, declarations from Department employees, and various exhibits, including Tristan's DFEH complaint and documents from Tristan's administrative proceeding before the Board.

Tristan filed an opposition. As to his FEHA claims, Tristan contended that "[b]ecause the [Board] proceeding tolled the statute of limitations and because the alleged misconduct occurred up to and including the time that [Tristan's] FEHA complaint was filed, the FEHA claims are not barred by the statute of limitations." Tristan also argued that his discrimination and retaliation FEHA claim (first cause of action) was not barred for failing to exhaust administrative remedies due to his alleged failure to adequately allege that he was stating a claim for discrimination in his DFEH administrative complaint. In support of this contention, Tristan noted that his DFEH complaint was entitled, "Complaint for Discrimination." Tristan argued that the individual defendants were not entitled to judgment as a matter of law on his FEHA harassment claim (second cause of action) because he had *implicitly* referred to these individuals in his DFEH complaint by alleging that his "supervisors" had engaged in harassment. As to the merits of his FEHA claims, Tristan contended that there was a triable issue of material fact with respect to both claims.

With respect to his whistleblower causes of action, Tristan contended that no California authority supported respondents' contention that a plaintiff must file a notice of claim with the Government Claims Board as a prerequisite to filing a Labor Code whistleblower claim (third cause of action). As to his Whistleblower Protection Act claim (fourth cause of action), Tristan maintained that he should be deemed to have exhausted his administrative remedies in light of the Board's unreasonable delay in adjudicating his administrative complaints.

Tristan supported his opposition with a lengthy declaration in which he set forth in detail his numerous grievances against respondents. In addition, Tristan attached numerous exhibits to his declaration and stated in his declaration that these exhibits "were generated by me, prepared by me, sent to me, or obtained by me through discovery in this action or through my employment." Tristan also requested that the trial court take judicial notice of various documents, including numerous provisions from the Department's operation manual.

Respondents raised a number of objections to the evidence that Tristan offered in opposition to their motion for summary judgment, including that the documents were not properly authenticated.[4]

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4 The trial court overruled 99 of the objections, and sustained the reminder of respondents' 342 objections. (See pt. III.A., *post*.) The court granted Tristan's request to take judicial notice of various statutes, but denied his request in all other respects.

C. *The trial court's ruling*

In its order granting respondents' motion for summary judgment, the trial court ruled that respondents were entitled to judgment as a matter of law on both of Tristan's whistleblower claims. The court ruled that Tristan's whistleblower claim under the Labor Code was barred because Tristan failed to file a mandatory notice of claim. The court further ruled that Tristan's claim under the Whistleblower Protection Act was barred because Tristan failed to exhaust his administrative remedies and because the disclosure at issue was not protected under the Act. The trial court also concluded that there was no triable of issue of fact with respect to Tristan's FEHA discrimination and retaliation claim (first cause of action) or his FEHA harassment claim (second cause of action). The court reasoned, "[T]here is no competent evidence that [Tristan] was harassed, retaliated, or discriminated against because of his membership in a protected class. . . . It is mere speculation that any of the conduct complained of was *because of* [Tristan's] status as a Hispanic, having a medical condition, and physical disability." The trial court concluded that Ayala, Garcia, and Rodriguez were also entitled to judgment as a matter of law on Tristan's FEHA claim for harassment (second cause of action) on the ground that Tristan failed to exhaust his administrative remedies as to these defendants by failing to specifically name them in his administrative complaint with the DFEH.[5]

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[5] The trial court rejected respondents' contention that Tristan failed to exhaust his administrative remedies with respect to his FEHA claim for discrimination and retaliation (first cause of action), noting that Tristan filed an administrative complaint entitled "Complaint of Discrimination." The court did not address any of the additional grounds for summary judgment that respondents asserted in their motion.

The court entered judgment in favor of respondents. Tristan timely appeals from the judgment.

III.

DISCUSSION

A. *Tristan has failed to establish that any of the trial court's evidentiary rulings constitute reversible error*

Tristan contends that the trial court made several erroneous evidentiary rulings in granting respondents' motion for summary judgment. Specifically, he complains that the trial court erred in sustaining certain objections that respondents asserted against "several paragraphs [of his declaration] as a group"; overruling an objection to one portion of his declaration pertaining to purported inconsistencies in Ferguson's reports concerning the October 2005 incident while sustaining an objection to a "substantially similar statement" later in his declaration;[6] issuing a "blanket order" sustaining respondents' objection to 41 pages of his declaration; and sustaining respondents' blanket objections to all of the documents attached to and/or referenced in Tristan's declaration.[7]

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6 Tristan contends that this "inconsistency and ambiguity necessarily renders the trial court's rulings questionable . . . ."

7 Tristan also argues that respondents' evidentiary objections were so numerous that the trial court "gave up" analyzing the merits of the objections. We reject this contention. Respondents and ultimately, the trial court, were tasked with considering the admissibility of Tristan's massive 156-page, 745-paragraph declaration. While Tristan complains about the "blanket" nature of many of respondents' objections and the trial court's rulings sustaining these objections, such broad objections and rulings were entirely understandable in light of the sheer length of Tristan's declaration, as well as its organization—or, more precisely, the lack thereof. For example, although Tristan

It is a fundamental tenet of appellate review that " '[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; Cal. Const., art. VI, § 13 [precluding reversal in the absence of error that "resulted in a miscarriage of justice"].) Further, we do not presume prejudice from an error. It is an appellant's burden to persuade us that the trial court erred in ways that resulted in a miscarriage of justice. (E.g., *Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601 ["The burden is on the appellant in every case affirmatively to show error and *to show further that the error is prejudicial*" (italics added)]; *In re Marriage of Dellaria* (2009) 172 Cal.App.4th 196, 205 ["the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice"]; Code Civ. Proc., § 475 ["There shall be no presumption that error is prejudicial, or that injury was done if error is shown"].)

Tristan fails to present *any* argument that the trial court's purported erroneous evidentiary rulings, viewed either individually or collectively, were prejudicial. In failing to make any showing of prejudice, Tristan has failed to carry his burden on appeal to demonstrate reversible error. (See *Shaw v. County of Santa Cruz* (2008) 170

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criticizes the trial court for sustaining respondents' "blanket objection" to 41 pages of his declaration, Tristan fails to mention that this objection was leveled at a *single* paragraph of the declaration (par. 740) that continued on for *41 pages*. In light of the length of his own declaration, Tristan has no cause to complain that respondents submitted numerous objections to that declaration.

Cal.App.4th 229, 282 [stating that "[appellants] fail to demonstrate how any claim of error in the trial court's exclusion of evidence would have made any difference in the outcome"].)

Accordingly, we conclude that Tristan has failed to establish that any of the trial court's evidentiary rulings constitute reversible error.

B. *The trial court properly granted respondents' motion for summary judgment*

Tristan contends that the trial court erred in granting respondents' motion for summary judgment.

1. *General principles of law governing summary judgment*

A moving party is entitled to summary judgment when the party establishes that it is entitled to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant may make this showing by establishing that the plaintiff cannot establish one or more elements of all of his causes of action, or that the defendant has a complete defense to each cause of action. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466.) "The moving party need address only those theories actually pled, and an opposition which raises new issues is no substitute for an amended pleading." (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1543 (*Bisno*).)

In reviewing a trial court's ruling on a motion for summary judgment, the reviewing court makes " 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to

judgment as a matter of law. [Citations.]' [Citation.]" (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143.)

"On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] ' . . . As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority.' [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.)

2. *The trial court did not err in granting judgment as a matter of law in favor of respondents on Tristan's whistleblower claims*

Tristan contends that the trial court erred in concluding that his claim under the Whistleblower Protection Act (§ 8547 et seq.) was barred in light of his failure to exhaust administrative remedies.[8]

a. *Factual and procedural background*

Tristan filed an administrative complaint with the Board alleging discrimination and retaliation in June 2007, and filed another administrative complaint with the Board entitled "Whistleblower Retaliation Complaint" in December 2007. On January 31, 2008, the Board consolidated the complaints and set them for an evidentiary hearing to be

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8 Tristan does not challenge on appeal the trial court's ruling that respondents were entitled to summary adjudication of his Labor Code section 1102.5 whistleblower claim in light of his failure to file a notice of claim with the Government Claims Board (§ 945.4) as required. Accordingly, we conclude that Tristan has abandoned this claim. (See, e.g., *Hood v. Compton Community College Dist.* (2005) 127 Cal.App.4th 954, 958, fn. 2 (*Hood*) ["We assume from plaintiffs' failure to discuss the due process violation claim in their opening brief that the cause of action has been abandoned"].)

held on March 24, 2008. In March 2008, the Department received notice that Ayala had filed a motion requesting that the Board vacate the hearing date because of a preplanned vacation. On March 11, the Board issued an order granting Ayala's motion, vacated the hearing date, and instructed the parties to cooperate in rescheduling the matter. On January 2, 2009, Tristan filed a request with the Board to withdraw his complaints. On March 17, 2009, the Board granted Tristan's request and closed the consolidated administrative proceeding.

b. *Governing law*

Section 8547.8 provides in relevant part:

> "(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. . . . *However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has issued, or failed to issue, findings pursuant to Section 19683.*" (Italics added.)

Section 19683 provides in relevant part:

> "(a) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 8547.3 within 10 working days of its submission. The executive officer shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In

these cases, the time limits described in this subdivision shall not apply."

In *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 968 (*Chiropractic Examiners*), the Supreme Court considered the exhaustion requirement contained in section 8547.8, subdivision (c). In that case, a state employee filed a complaint with the Board alleging whistleblower retaliation in violation of the Whistleblower Protection Act. (*Chiropractic Examiners*, *supra*, at p. 969.) After the Board's executive officer conducted an investigation, the executive officer then issued a 16-page "Notice of Findings" recommending dismissal of the employee's complaint. (*Ibid*.) Rather than filing a petition for hearing to seek Board review of the executive officer's recommended findings,[9] the state employee filed a civil suit against her employer and its executive director pursuant to section 8547.8, subdivision (c). (*Chiropractic Examiners*, *supra*, at p. 970.)

The defendants filed a motion for summary judgment, contending that the employee had failed to exhaust her administrative and judicial remedies. (*Chiropractic Examiners*, *supra*, 45 Cal.4th at p. 970.) The trial court denied the motion, but the Court of Appeal issued an alternative writ and concluded that the employee had failed to exhaust her administrative and judicial remedies. (*Ibid*.) The Court of Appeal reasoned

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9 The *Chiropractic Examiners* court explained that the employee had such a right pursuant to various Board regulations. (*Chiropractic Examiners*, *supra*, 45 Cal.4th at pp. 969-970.) The court also explained that when the state employee elected not to file a petition for hearing before the Board, "by operation of the [B]oard's regulations, the executive officer's 'recommended' findings became the [B]oard's 'final [d]ecision.' " (*Id*. at p. 974.)

"that exhaustion of administrative and judicial remedies in this case required more than merely filing a complaint with the [Board] and receiving the findings of its executive officer; [the employee] also needed to complete the administrative process by petitioning the [B]oard for a hearing before an [administrative law judge], and if this hearing request was denied, she then needed to seek a writ of mandate from the courts in an effort to have the [B]oard's findings set aside." (*Ibid*.)

The Supreme Court began its analysis of the case by interpreting the requirements in section 8547.8, subdivision (c) that, prior to filing suit, the employee file a complaint with the Board and that "the [B]oard . . . issue[], or fail[] to issue, findings pursuant to [s]ection 19683." The *Chiropractic Examiners* court interpreted the "findings" requirement in section 8547.8, subdivision (c) as referring to the findings of the Board's *executive officer*, reasoning, "[s]ection 19683, subdivision (a)] clearly uses the term 'findings' to refer to the *initial decision* of the [B]oard's executive officer (issued within 70 days of the filing of the complaint), and therefore section 8547.8 [, subdivision] (c)'s express cross-reference to section 19683 indicates that this initial decision constitutes the 'findings' that satisfy section 8547.8 [, subdivision] (c)." (*Chiropractic Examiners*, *supra*, 45 Cal.4th at p. 971.) The Supreme Court proceeded to apply this interpretation of section 8547.8, subdivision (c) and concluded that the state employee had exhausted her administrative remedies by receiving the findings of the Board's executive officer. (*Chiropractic Examiners*, *supra*, 45 Cal.4th at p. 973 ["[T]he only prerequisite to bringing suit that the statute mentions is the issuance of (or failure to issue) 'findings

pursuant to [s]ection 19683,' which occurred when the [B]oard's executive officer issued the 'Notice of Findings' "].)

In reversing the Court of Appeal's determination that the employee was required to attempt to set aside the Board's adverse findings by way of writ proceedings the *Chiropractic Examiners* court stated:

> "We conclude therefore that section 8547.8[, subdivision] (c) means what it says: An employee complaining of whistleblower retaliation may bring an action for damages in superior court, but only *after* the employee files a complaint with the State Personnel Board and the [B]oard 'has issued, or failed to issue, findings.' So long as the [B]oard has issued findings (or the deadline for issuing findings has passed), the employee may proceed with a damages action in superior court regardless of whether the [B]oard's findings are favorable or unfavorable to the employee." (*Chiropractic Examiners, supra*, 45 Cal.4th at p. 978, fn. omitted.)

The Supreme Court also rejected the Court of Appeal's suggestion that permitting an employee to file a civil action pursuant to section 8547.8, subdivision (c) notwithstanding an adverse Board decision would render the proceedings before the Board " 'meaningless' " (*Chiropractic Examiners, supra*, 45 Cal.4th at p. 976), noting that numerous statutes "require[] or permit[] disputing parties to complete a nonbinding adjudicative procedure before proceeding with a damages action in superior court." (*Ibid.*)

c. *Respondents were entitled to judgment as a matter of law on Tristan's Whistleblower Protection Act claim because there is no evidence that the Board issued, or failed to issue, findings pursuant to section 19683 as required*

In order to state a claim pursuant to section 8547.8, subdivision (c), Tristan was required to have first filed an administrative complaint with the Board and the Board

must have "issued, or failed to issue, findings pursuant to [s]ection 19683." (§ 8547.8, subd. (c); see also *Chiropractic Examiners*, *supra*, 45 Cal.4th at p. 978.) It is undisputed that neither the Board nor the Board's executive officer issued any findings pursuant to section 19683. Further, since the Board consolidated Tristan's June and December 2007 complaints to the Board, the ordinary 70-day time limit for the Board's executive officer to render an initial decision after an employee files a "written complaint of reprisal or retaliation as prohibited by Section 8547.3" with the Board (§ 19683, subd. (a)) did not apply. (*Ibid*. ["When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply"].) Thus, there is no evidence that the Board "failed to issue[] findings pursuant to [s]ection 19683." (§ 8547.8, subd. (c); see *Chiropractic Examiners*, *supra*, 45 Cal.4th at p. 978 [board fails to issue findings under § 8547.8, subd. (c) when "the deadline for issuing findings has passed"].)

i. *Tristan's contention that he should be deemed to have satisfied the exhaustion requirement contained in section 8547.8, subdivision (c) is without merit*

Tristan does not argue that the time limits in section 19683, subdivision (a) do in fact apply, or that the Board failed to issue findings within the time frame set by the statute. Further, Tristan does not dispute that he voluntarily withdrew his complaints before the Board or its executive officer issued any findings. Rather, Tristan argues that he should be deemed to have satisfied the exhaustion requirement in section 8547.8, subdivision (c) because the Board unreasonably delayed the adjudication of his

complaints, and that it "did so at the behest of the [respondents]." We disagree. The record contains no admissible evidence that the Board unreasonably delayed its adjudication of Tristan's complaints, and no evidence that respondents sought to facilitate any such delay.[10]

We also reject Tristan's policy argument that "[t]here should be no distinction between [the] situation [in *Chiropractic Examiners*]—in which *adverse* rulings [by the Board] were issued—and this one, in which no rulings were issued at all." In so arguing, Tristan contends that he should not be held to the requirement that he have completed the adjudicatory process with the Board because even if he had received adverse findings from the Board, he would have been permitted to file a Whistleblower Protection Act claim in a civil lawsuit. The *Chiropractic Examiners* court implicitly rejected this contention. (See *Chiropractic Examiners*, *supra*, 45 Cal.4th at p. 976 ["Our conclusion [that the Board's conclusions are nonbinding in a civil suit] does not make the proceeding

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10 Tristan stated in his declaration, "The [Department] refused to calendar a hearing date, stating that they need more time and [the Board] advised me that the [Department] could request indefinite continuances." However, respondents objected to this portion of Tristan's declaration on the ground that it lacked foundation, and the trial court sustained the objection. There is no other evidence in the record that supports Tristan's statement.

Tristan did not separately address this evidentiary ruling in his briefing on appeal, and, as noted, did not present any argument as to prejudice with respect to any of the trial court's evidentiary rulings. (See pt. III.A., *ante*.) However, Tristan did cite this objection as among those that he contends respondents improperly "asserted against several paragraphs as a group." Even assuming that Tristan's evidentiary claim did not fail on the ground that he made no showing of prejudice, we conclude that Tristan has failed to demonstrate that the trial court abused its discretion in sustaining respondents' objection to this portion of his declaration. (See *Shaw v. County of Santa Cruz*, *supra*, 170 Cal.App.4th at p. 282 [stating that appellants' "generalized arguments about the trial court's exclusion of broad categories of evidence fail to demonstrate reversible error"].)

before the State Personnel Board a 'waste of time' and 'meaningless' "].) The *Chiropractic Examiners* court explained that the Legislature often mandates that "disputing parties . . . *complete* a nonbinding adjudicative procedure," as a means of promoting settlement and "resolving minor disputes with minimal expense to the parties." (*Chiropractic Examiners, supra,* at p. 977, italics added.) In this case, Tristan *abandoned* the nonbinding adjudicative procedure specified in the Whistleblower Protection Act before he received any findings from the Board. Accordingly, we reject Tristan's contention that he may bring a claim pursuant to section 8547.8, subdivision (c) notwithstanding his *failure to complete* the Board's administrative process.[11]

ii. *Tristan's contention that he may bring a lawsuit pursuant to section 8547.8, subdivision (c) because the Board failed to timely render a decision under former section 18671 is without merit*

Tristan also contends that he satisfied the exhaustion of administrative remedies requirement in section 8547.8, subdivision (c) because the Board failed to timely render a decision under former section 18671.1. We conclude that former section 18671.1, which applies when a state employee seeks *to set aside an adverse employment action* does not apply when a state employee files an administrative complaint pursuant to the

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11 In light of our conclusion, we need not consider respondents' contention that the trial court properly granted judgment as a matter of law in respondents' favor on Tristan's Whistleblower Protection Act claim on the ground that there is no evidence in the record that Tristan made a protected disclosure under the Act.

Whistleblower Protection Act prior to filing a *civil action for damages*. (§ 8547.8, subd. (c).)[12]

Former section 18671.1 provided in relevant part:

> "Whenever a hearing or investigation is conducted by the board or its authorized representative *in regard to an appeal by an employee*, the hearing or investigation shall be commenced within a reasonable time after the filing of the petition and the board shall render its decision within a reasonable time after the conclusion of the hearing or investigation, except that the period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of the submission, whichever time period is less, and except that the board may extend the six-month period up to 45 additional days. In the event of an extension, the board shall publish substantial reasons for the need for the extension in its calendar prior to the conclusion of the six-month period. . . . The provisions relating to the six-month or the 90-day periods for a decision may be waived by the employee but if not so waived, a failure to render a timely decision is an exhaustion of all available administrative remedies. In cases involving complaints of discrimination, harassment, or retaliation, where the executive officer renders a decision, the decision shall be rendered within four months of the filing of the appeal." (Stats. 1987, ch. 380, § 1, italics added.)

In *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1137-1138 (*CCPOA*), the Supreme Court explained that "[Former] Government Code section 18671.1 specifies the time within which the . . . the Board . . . must render a decision following a hearing or investigation of a state employee's *appeal*

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12 We assume for purposes of this decision that a state *agency* may be liable pursuant to section 8547.8, subdivision (c), which provides that "*any person* who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party." (§ 8547.8, subd. (c), italics added.)

from a departmental disciplinary action." (Italics added, fn. omitted.) The *CCPOA* court held that when the Board fails to render a timely decision adjudicating a state employee's appeal of his employer's adverse action, the employee *may file a writ of mandate in the trial court to set aside the aside the employer's adverse action*:

> "When the Board fails to comply with [former] section 18671.1 by rendering its decision of a civil service employee's appeal from an adverse action within the time limit established by that section, the Board does not lose jurisdiction over the appeal. It may continue to process the appeal by investigation, hearing, and decision. An employee who has not waived the time limit may, however, either seek mandate to compel the Board to render a decision by a time certain, or seek de novo judicial review of the adverse action by the appointing authority by petition for writ of mandamus brought against the appointing authority pursuant to Code of Civil Procedure section 1085 to set aside the adverse action." (*CCPOA*, *supra*, at p. 1156.)

Tristan seeks to impose *civil liability* on respondents via his section 8547.8, subdivision (c) claim, not *to set aside an adverse departmental disciplinary action*. Thus, former section 18671.1 and *CCPOA* have no application. Even assuming that we were to conclude that Tristan was permitted to file a civil action under the rationale of *CCPOA*, we would conclude that he failed to do so in a timely manner, and thereby waived any time limit that would otherwise apply. The Supreme Court stated that an action authorized under that case "should be filed within a reasonable time after expiration of the statutory time limit for decision by the Board . . . ." (*CCPOA*, *supra*, 10 Cal.4th at p. 1156.) The court reasoned:

> "The purpose of the section 18671.1 time limit and of the provision giving the employee the option to seek judicial review of the adverse action if that limit is not observed is to ensure speedy resolution of the employee's status. That purpose is frustrated, not furthered, if

> the petition is not filed promptly when the time limit has been exceeded and the employee has no reason to anticipate that decision of the appeal is imminent. Failure to file the petition promptly is an implicit waiver of the statutory time limit." (*CCPOA*, *supra*, at p. 1156, fn. 6.)

Tristan maintains that the Board was required to file a decision on his administrative complaints by June 2008. Yet, Tristan did not file this civil action until May 2009. The fact that Tristan waited for almost a year from the time he claims the Board should have acted before filing his civil action constitutes an implicit waiver any applicable time limit imposed on the Board by virtue of former section 18671.1. (See *CCPOA*, *supra*, 10 Cal.4th at p.1156, fn. 6 [failure to seek judicial review "promptly" is an "implicit waiver of the statutory time limit" contained in former § 18671.1].)

3. *The trial court properly granted judgment as a matter of law in favor of respondents on Tristan's FEHA claims*

Tristan contends that the trial court erred in granting judgment as a matter of law for respondents on his FEHA claims for discrimination and retaliation (first cause of action) and harassment (second cause of action). Respondents argue that Tristan's FEHA claims are barred by the one-year statute of limitations insofar as the claims are premised on events that occurred more than a year before January 29, 2009 – the date on which Tristan filed an administrative complaint with the DFEH.[13] Respondents argue further

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13 Tristan contends that it was "procedurally [ ] improper" for respondents to raise this contention on appeal, because the trial court did not rule on respondents' statute of limitations argument in ruling on their motion for summary judgment. We disagree that it is procedurally improper for a respondent to raise an alternative ground for affirmance in an appeal. (See *Dominguez v. American Suzuki Motor Corp.* (2008) 160 Cal.App.4th 53, 57 [appellate court "may affirm an order granting summary judgment on a ground not

that neither the continuing violation doctrine nor the equitable tolling doctrine excuses Tristan's failure to file a timely administrative complaint with DFEH with respect to events that occurred prior to January 29, 2008. With respect to conduct that Tristan alleged occurred after January 29, 2008, respondents maintain that there was no evidence that Tristan was discriminated against, retaliated against, or harassed because of his membership in a protected class. We agree with respondents that Tristan's FEHA claims are barred by the one-year statute of limitations to the extent that they are based on events that occurred prior to January 29, 2008. We further conclude that there is no triable issue of material fact with respect to whether respondents discriminated against, retaliated against, or harassed Tristan because of his membership in a protected class at any time after January 29, 2008.

a. *Tristan's FEHA claims are barred to the extent that they are based on events that occurred prior to January 29, 2008*

"Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with [DFEH] and must obtain from [DFEH] a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. [Citations.] The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. [Citations.] [¶] As for the

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relied on by the trial court, if the parties have been afforded the opportunity to brief the issue," citing Code Civ. Proc. § 437c, subd. (m)(2)].) Further, although Tristan correctly notes that he must be afforded an opportunity to brief any "ground not relied upon by the trial court" (Code Civ. Proc., 437c., subd. (m)(2)), he has been afforded such an opportunity and has addressed respondents' statute of limitations argument in his reply brief. The requirement of Code of Civil Procedure section 437c, subdivision (m)(2) has thus been fully satisfied. (See *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147.)

applicable limitation period, FEHA provides that no complaint for any violation of its provisions may be filed with [DFEH] 'after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred,' with an exception for delayed discovery not relevant here. [Citation.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492, italics omitted; see § 12960, subd. (d).) Under certain circumstances, described in detail below, an employee's failure to file an administrative complaint within one year of an alleged unlawful practice may be excused by either the continuing violation doctrine or the equitable tolling doctrine. (See *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802, 813 (*Richards*) [describing continuing violation doctrine]; (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*) [describing equitable tolling doctrine].)

It is undisputed that Tristan did not file a complaint with DFEH until January 29, 2009. Therefore, unless the continuing violation doctrine or the equitable tolling doctrine applies, Tristan failed to file a timely administrative complaint with respect to any conduct that occurred prior to January 28, 2008. For the reasons stated below, we conclude that as a matter of law, neither doctrine applies.

i. *The continuing violation doctrine does not apply*

The one-year statutory period for filing an administrative complaint with DFEH may be extended pursuant to the continuing violation doctrine. The continuing violation doctrine "allows liability for unlawful employer conduct occurring *outside* the statute of limitations if it is sufficiently connected to unlawful conduct *within* the limitations period." (*Richards, supra*, 26 Cal.4th at p. 802, italics added.) In *Richards*, the

California Supreme Court concluded that "an employer's series of unlawful actions in a case of failure to reasonably accommodate an employee's disability, or disability harassment, should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of 'permanence' so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile." (*Ibid.*) In *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1059-1060 (*Yanowitz*), the California Supreme Court made it clear that the continuing violation doctrine may apply to a claim for retaliation.

Tristan's first amended complaint outlined a series of purportedly unlawful actions that respondents allegedly undertook in connection with the injury that Tristan suffered in October 2005. Included among those actions were that Ayala and Garcia committed misconduct related to reports pertaining to the incident which, Tristan maintains, hampered his ability to receive enhanced disability benefits, that the Department instituted an internal affairs investigation related to Tristan's disability benefits claim, that the Department did not initially permit Tristan to perform "light duty" after his injury, and that Ayala and Garcia assigned Tristan an excessive workload when he returned to work in January 2007. All of this purported discrimination took place more than one year prior to Tristan's filing his complaint with the DFEH in January 2009.

Tristan also alleged that employees of the Department engaged in certain unlawful conduct in connection with a second work-related injury that Tristan suffered in January 2008. The alleged misconduct included interfering with his ability to seek proper

medical treatment, failing to negotiate a proper light duty assignment, and interfering with his right to receive workers' compensation benefits.

Applying the *Richards* factors to the allegations of the alleged unlawful conduct described above makes it clear that the continuing violation doctrine does not apply.[14] The actions that Tristan alleges were taken *within* the limitations period (i.e. those related to the 2008 injury) are not "similar in kind" to those taken *outside* of the limitations period (i.e. those related to the 2005 injury). (*Richards, supra,* 26 Cal.4th at p. 802.) The alleged discriminatory conduct is different in kind, was taken in response to separate injuries, and, to a large extent, was undertaken by different individuals.[15] In addition, the alleged discriminatory actions did not occur with "sufficient frequency" as to comprise a course of conduct, but rather, constitute a series of discrete actions allegedly committed by numerous different Department employees. (*Ibid.*; see also *Yanowitz, supra,* 36 Cal.4th at pp. 1058-1059 [continuing violation doctrine may apply where "plaintiff alleges a retaliatory *course of conduct* rather than a discrete act of retaliation"].) Finally, many of the actions that are alleged to have occurred outside the limitations period had "acquired a degree of 'permanence' so that [Tristan was] on notice that further efforts at informal conciliation with the Department . . . would be futile." (*Richards,*

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14 In his brief, Tristan does not refer to the continuing violation doctrine by name nor does he cite any of the case law outlining its elements.

15 Tristan's allegations with respect to his 2005 injury focused largely on Garcia and Ayala, who were his supervisors at that time. His allegations pertaining to the 2008 injury focused on his new supervisor, Rosemond, and an employee in the Department's Return to Work Office, De Leon.

supra, at p. 802.) For example, it is undisputed that Tristan learned of the outcome of the internal investigation that the Department conducted with respect to his October 2005 injury in May 2006—well outside of the limitations period.

Accordingly, we conclude that the continuing violation doctrine does not apply so as to make actionable allegedly unlawful conduct that occurred prior to January 28, 2008.

ii. *The equitable tolling doctrine does not apply*

The one-year period for filing an administrative complaint with DFEH may also be extended by operation of the equitable tolling doctrine. "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]" (*McDonald*, *supra*, 45 Cal.4th at p. 99.) "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citations.]" (*Id.* at p. 100.) For example, equitable tolling "may apply where one action stands to lessen the harm that is the subject of a potential second action." (*Ibid.*)

In order to prove the applicability of the doctrine, a party must establish "three elements: 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' [Citations.]" (*McDonald*, *supra*, 45 Cal.4th at p. 102.) " ' "The timely notice requirement essentially means that the first claim must

have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." [Citation.] "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." [Citation.] "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California* [(1978)] 21 Cal.3d 313, the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." [Citation.]' [Citation.]" (*McDonald, supra,* at p. 102, fn. 2.) "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*Id*. at p. 111.)

The party seeking to invoke equitable tolling to avoid a limitations bar bears the burden of proving the applicability of the doctrine. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912.) Therefore, " ' "[if] on the face of the complaint the action appears barred by the statute of limitations, plaintiff has an obligation to anticipate the defense and plead facts to negative the bar." [Citation.]' [Citation.]" (*Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 407 (*Aubry*) [concluding trial court properly sustained demurrer on ground that statute of limitations barred claim where plaintiff

failed to allege "elements necessary for application of the doctrine of equitable tolling of the statute of limitations"] (*ibid*.).)

We assume for purposes of this decision that a state employee's pursuit of administrative remedies with the Board constitutes the type of "internal administrative remedies" (*McDonald, supra*, 45 Cal.4th at p. 101) that *may* serve to toll the statute of limitations from running on a FEHA claim.[16] However, contrary to Tristan's contention in his reply brief that the equitable tolling doctrine applies *whenever* a party pursues both an internal administrative remedy and subsequently files a FEHA claim,[17] the *McDonald* court held merely that "equitable tolling *may* apply to the pursuit of internal administrative remedies prior to filing a FEHA claim" where a plaintiff establishes the factual elements of the doctrine. (*McDonald, supra*, at p. 99, italics added; see also *id*. at

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16 Respondents argue that the rationale of *McDonald* does not apply in this case, noting that *McDonald* involved a school district's employee's pursuit of "internal administrative remedies" (*McDonald, supra*, 45 Cal.4th at p. 101), which respondents contend is not akin to a state employee's filing of a complaint with the Board. However, in *McDonald*, the Supreme Court stated, "[I]n [*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1092 (*Schifando*)] we held exhaustion of *internal administrative remedies* prior to filing a FEHA claim is not mandatory." (*McDonald, supra*, at p. 101.) *Schifando*, in turn, analogized a city employee's pursuit of administrative remedies with a city's civil service commission to a *state* employee's pursuit of remedies with the *Board*. (*Schifando, supra*, 31 Cal.4th at pp. 1087-1088.) Accordingly, we assume for purposes of this decision that a state employee's pursuit of administrative remedies with the Board constitutes the type of "internal administrative remedies" (*McDonald, supra*, at p. 101) that *may* serve to toll the statute of limitations on a FEHA claim, *where factually supported*.

17 Tristan argues in his brief, "[T]he California Supreme Court held in [*McDonald*] that where a government employee engages in internal grievance procedures—even when those procedures are not mandatory—*that tolls the statute of limitations for submitting a FEHA complaint*."

p. 114 ["we did not grant . . . review . . . [to consider] application of equitable tolling principles to the specific factual record in this case"].) In this case, for the reasons stated below, we conclude that, as a matter of law, the equitable tolling doctrine does not apply.

To begin with, Tristan has failed to demonstrate that he alleged facts in the operative first amended complaint sufficient to establish the elements of equitable tolling.[18] Our own review of the first amended complaint reveals that Tristan made no mention of the equitable tolling doctrine. Indeed, the only allegations in the first amended complaint that relate to Tristan's pursuit of a claim with the Board were offered as an example of the Department's purported discriminatory conduct, not in support of a contention that the equitable tolling doctrine applied. Tristan alleged:

> "The discrimination, harassment and retaliation . . . includes, without limitation, the following types of disparate treatment, discrimination, harassment, and retaliation:
>
> "[¶] . . . . [¶]
>
> "[Tristan] . . . pursued an appeal through the [Board] and in a letter dated December 14, 2007, Ms. Tamara Lacy from the [Board] requested additional information. As a result, [Tristan] was offered and accepted mediation through that process. [Tristan] was advised by [the Board] that . . . [the Department] refused to mediate plaintiff's claims. [Tristan] requested and was granted a hearing by [the Board]. However, the [Department] requested additional time to prepare for the hearing and never responded to requests for [d]iscovery from [Tristan's] attorney . . . . [The Department] denied [Tristan] the opportunity for mediation."

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[18] Tristan does not provide a single citation to the first amended complaint in the section of his brief in which he claims equitable tolling.

These allegations, even if proven, would not establish that Tristan filed a timely claim with the Board, that the claim was based on the same allegations that he later asserted in his FEHA claim, or that he acted reasonably and in good faith in pursuing such a claim. (See *McDonald, supra*, 45 Cal.4th at p. 102 [listing elements necessary to establish equitable tolling].) Because Tristan failed to allege facts sufficient to prove equitable tolling, respondents were not required to address the doctrine in moving for summary judgment. (See *Aubry, supra*, 201 Cal.App.3d at p. 407 [plaintiff seeking to rely on equitable tolling doctrine is require to plead facts justifying its application]; *Bisno, supra*, 174 Cal.App.4th at p. 1543 [party moving for summary judgment need only address theories actually pled].)[19]

Even assuming that Tristan sufficiently alleged equitable tolling in his first amended complaint, there is insufficient evidence in the record to create a triable issue of fact with respect to its application in this case. In particular, there is no evidence that Tristan acted reasonably and in good faith in pursuing a remedy with the Board. Rather, as discussed in part III.B.2., *ante*, after the Board vacated a hearing date in March 2008, the undisputed facts demonstrate that Tristan failed to take any affirmative steps to further pursue his administrative remedies with the Board before filing a request to voluntarily dismiss his administrative complaints in January 2009. (Cf. *McDonald*,

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19 Respondents did not address the issue of equitable tolling in their initial motion for summary judgment. However, after Tristan improperly raised the issue in his opposition to their motion (see *Bisno, supra*, 174 Cal.App.4th at p. 1543 ["an opposition [to a motion for summary judgment] which raises new issues is no substitute for an amended pleading"]), respondents argued in their reply that the doctrine did not apply.

supra, 45 Cal.4th at p. 111 ["voluntary abandonment [of the first proceeding] . . . may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling"].)[20]

Accordingly, we conclude that Tristan's FEHA claims are barred to the extent that they are based on allegedly unlawful conduct that he contends occurred prior to January 29, 2008. The trial court thus did not err in granting judgment as a matter of law for respondents on Tristan's FEHA claims insofar as those claims were based on unlawful conduct that is alleged to have occurred before this date.

b. *There is no evidence from which a jury could find that respondents discriminated against, retaliated against, or harassed Tristan because of his membership in a protected class at any time after January 29, 2008*

Tristan contends that the trial court erred in granting judgment as a matter of law in favor of respondents on his FEHA claims (discrimination and retaliation (first cause of action) and harassment (second cause of action)), because, he maintains, there is a triable issue of fact with respect to whether respondents committed unlawful conduct in violation of FEHA *after* January 29, 2008. Specifically, Tristan contends that the "evidence [offered in opposition to the respondents' motion for summary judgment]—at the very least—demonstrated reasonable inferences supporting the conclusion that

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20 In light of our conclusions, we need not consider whether there is a triable issue of material fact with respect to the remainder of the elements necessary to establish equitable tolling. Specifically, we need not determine whether Tristan's June and December 2007 administrative complaints to the Board, which were filed more than a year after the initial conduct of respondents of which Tristan complains, were "timely filed" (*McDonald*, *supra*, 45 Cal.4th at p. 102), or whether Tristan's claims with the Board were sufficiently similar to his FEHA claim such that respondents would not be prejudiced by a tolling of the statute of limitations. (See *McDonald*, *supra*, 45 Cal.4th at p. 102 [describing "lack of prejudice" element].)

[respondents'] actions were discriminatory and were directed at Tristan because of (or arising out of) his injury and resulting physical disability."[21] Tristan argues that the same evidence that supports his discrimination claim, as well as evidence that "after [he] broke the chain of command and reported his supervisors' misconduct, he was retaliated against by his supervisors" supports his retaliation claim. Finally, Tristan maintains that the evidence that supports his discrimination claim also supports his harassment claim.

For the reasons discussed below, we conclude that none of the evidence that Tristan cites on appeal in support of these contentions demonstrates a triable issue of material fact with respect to either of his FEHA claims.

i. *The law governing discrimination, retaliation, and harassment claims under FEHA*

"Section 12940, within the FEHA, prohibits numerous 'employment practice[s]' specified in the subdivisions of the section—in general, invidious discrimination or harassment, and retaliation for complaining about such conduct." (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1426.)

Section 12940 subdivision (a) provides that it is an "unlawful employment practice," for an employer "because of . . . physical disability. . . to discriminate against . . . [a] person in compensation or in terms, conditions, or privileges of

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21 In opposing respondents' motion for summary judgment, Tristan maintained that respondents had committed unlawful conduct under FEHA based on both his race and his physical disability. On appeal, Tristan does not discuss any evidence pertaining to a claim of discrimination or harassment based on race. Accordingly, we conclude that Tristan has abandoned his FEHA claims insofar as they were premised on alleged racial discrimination or harassment. (See, e.g., *Hood*, *supra*, 127 Cal.App.4th at p. 958, fn. 2.)

employment." Section 12940, subdivision (h) makes it unlawful "[f]or any employer . . . to . . . discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." Section 12940, subdivision (j)(1) provides that an employer may not "harass an employee" because of their "physical disability."

An " 'employee "may raise a presumption of discrimination by presenting a 'prima facie case,' the components of which vary with the nature of the claim, but typically require evidence that '(1) [the plaintiff] was a member of a protected class [or engaged in a protected activity], (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory [or retaliatory] motive.' " ' " (*Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1220, citations omitted.)

"[H]arassment [under FEHA] focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706, italics omitted.) In order to prevail on a claim for harassment under FEHA a plaintiff must present evidence that would allow a "jury to conclude that the hostility was pervasive and effectively changed the conditions of [the plaintiff's] employment." (*Id*. at p. 710.)

ii. *Application*

In the legal argument section of his brief pertaining to his FEHA claims, Tristan focuses almost exclusively on alleged unlawful conduct that he maintains took place *prior* to January 29, 2008. For the reasons explained in part III.B.3.a., *ante,* such conduct is not actionable in light of the applicable one-year statute of limitations (§ 12960, subd. d)).

In the statement of facts in his appellate brief, Tristan contends that "[a]fter [he] was injured again in a parole arrest in January[] 2008, he was again subjected to wrongful denial of benefits, was improperly forced to obtain medical treatment from a physician not of his choosing, was refused a light duty assignment and once he obtained a light duty assignment, was once again subjected to oppressive and excessive workload assignments." Tristan supported these numerous factual assertions with a string citation to 44 separate portions of his declaration that he offered in opposition to respondents' motion for summary judgment.

In light of Tristan's failure to "provid[e] exact record page citations for each fact cited" (*Lewis*, *supra*, 93 Cal.App.4th at p. 114), and the lack of legal argument pertaining to respondents alleged conduct *after* January 29, 2008, we would be justified in concluding that Tristan has forfeited any argument premised on such alleged conduct. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [appellate court may deem forfeited any argument raised without the "presentation of cogent argument with specific citations to the record"].) Nevertheless, we assume for purposes of this decision that Tristan has adequately raised his claim that the trial court erred in granting judgment as a

matter of law for respondents with respect to alleged unlawful conduct that occurred after January 29, 2008.

On the merits, none of the statements from Tristan's declaration that he cites in support of these assertions demonstrates a triable issue of material fact with respect to either of his FEHA claims. While the declaration demonstrates that Tristan disagreed with personnel decisions made in the wake of his 2008 injury, he presented no evidence from which a jury could conclude that those personnel actions were undertaken in order to discriminate, retaliate against, or harass him.[22]

Accordingly, we conclude that the trial court properly granted judgment as a matter of law in favor of respondents on Tristan's FEHA claims.[23]

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22 Tristan's contention that "once he obtained a light duty assignment, [he] was once again subjected to oppressive and excessive workload assignments," is without merit in light of the fact that it is undisputed that *Tristan did not return to work at any time after his January 2008 injury prior to filing the operative first amended complaint*.

23 In light of this conclusion, we need not consider whether the trial court properly granted judgment as a matter of law in favor of the individual defendants on Tristan's FEHA claim for harassment (second cause of action) on the alternative ground that Tristan failed to exhaust his administrative remedies against these defendants due to his failure to name them in his administrative complaint with the DFEH. We also need not consider any of the additional alternative grounds for affirmance that respondents raise in their brief related to Tristan's FEHA claims.

IV.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.